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IN THE
Supreme Court of the United States

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA AND THE ALABAMA DEPARTMENT OF YOUTH SERVICES,
Petitioners,

v.

PATRICIA GARRETT AND MILTON ASH,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES *ET AL.* AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

(Additional *Amici* Listed on Inside Cover)

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The American Association of People with Disabilities

AARP

ADAPT

The American Council of the Blind

The American Foundation for the Blind

The American Network of Community Options and Resources

The Arthritis Foundation

Easter Seals, Inc.

The Epilepsy Foundation

The Learning Disabilities Association of America

The National Association of the Deaf

The National Association of People with AIDS

The National Association for Rights Protection and Advocacy

The National Council on Independent Living

The National Mental Health Consumers' Self-Help Clearinghouse

The National Multiple Sclerosis Society

The National Organization on Disability

The National Parent Network on Disabilities

The National Senior Citizens Law Center

The Polio Society

Volunteers of America, Inc.

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BRIEF FOR THE AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES *ET AL.* AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI CURIAE* [1]

This brief is filed on behalf of the American Association of People with Disabilities, AARP, ADAPT, the American Council of the Blind, the American Foundation for the Blind, the American Network of Community Options and Resources, the Arthritis Foundation, Easter Seals, Inc., the Epilepsy Foundation, the Learning Disabilities Association of America, the National Association of the Deaf, the National Association of People with AIDS, the National Association

[1] No counsel for any party had any role in authoring this brief, and no persons other than the *amici curiae* and their counsel made any monetary contribution to its preparation or submission. Written consents from the parties to the filing of this brief are on file with the Clerk of the Court.

for Rights Protection and Advocacy, the National Council on Independent Living, the National Mental Health Consumers' Self-Help Clearinghouse, the National Multiple Sclerosis Society, the National Organization on Disability, the National Parent Network on Disabilities, the National Senior Citizens Law Center, the Polio Society, and Volunteers of America, Inc. These organizations, the interests of which are described in more detail in the Appendix to this brief, have worked for years on behalf of persons with disabilities and have brought, supported, or participated in numerous lawsuits on behalf of such persons. They all have a strong institutional interest in the constitutionality of the Americans with Disabilities Act as applied to the States and in vindicating the principles of equality embodied in that Act.

INTRODUCTION AND SUMMARY OF ARGUMENT

This brief focuses on one significant aspect of Petitioners' claim that the Americans with Disabilities Act ("ADA" or "the Act") cannot be sustained under Section 5 of the Fourteenth Amendment—the claim that the central provisions of the ADA go far beyond prohibiting conduct that, when engaged in by a State actor, violates the Equal Protection Clause of the Fourteenth Amendment. We understand that the Brief for Respondents and several of the *amicus* briefs supporting Respondents will argue that, to the extent that the ADA goes beyond the prohibitions of the Fourteenth Amendment, it does so in a manner that satisfies the "congruence and proportionality" test of *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997), and *Kimel v. Florida Board of Regents*, 120 S. Ct. 631, 644-45 (2000). While the *amicus* organizations signing this brief strongly support those arguments, this brief takes issue with the widespread assertion that the prohibitions of the ADA greatly exceed the prohibitions of the Equal Protection Clause.

The circuit court decisions that have struck down the ADA as applied to the States have in large part relied upon the proposition that the prohibitions of the ADA go far beyond

the prohibitions of the Equal Protection Clause. Taking into account this Court's prior holding that persons with disabilities do not form a "suspect class," *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439-42 (1985), one of the notable decisions below states flatly that "the ADA 'prohibits very little conduct likely to be held unconstitutional,'" and "*no one* believes that the Equal Protection Clause establishes the disparate-impact and mandatory-accommodation rules found in the ADA." *Erickson v. Board of Governors*, 207 F.3d 945, 949 & 951) (7th Cir. 2000), *petition for cert. filed sub nom. United States v. Board of Governors*, 69 U.S.L.W. 3003 (U.S. June 26, 2000). This view is echoed in the Brief for Petitioners: "[I]t is the rare classification based on disability that would rise to the level of a constitutional violation" (Pet. Br. at 28), and "the two mandates are worlds apart in their substantive rules" (*id.* at 30). It is also echoed in the Brief of *Amici Curiae* States in Support of Petitioners: "[T]he ADA '* * * prohibits substantially more State . . . decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard.'" *Id.* at 15 (quoting *Kimel*, 120 S. Ct. at 647).

The premises behind these propositions are two-fold: first, an unduly narrow position on the meaning of the Equal Protection Clause as applied to "non-suspect" classifications and, second, a position on the meaning or application of the prohibitions of the ADA that ignores some important limitations in that Act.

The notion that the prohibitions of the ADA go far beyond the prohibitions of the Equal Protection Clause appears to be rooted in *Washington v. Davis*, 426 U.S. 229 (1976), and *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979). Both are conventionally cited for the proposition that, to show a violation of the Equal Protection Clause, "it is insufficient to show that a neutral classification has a disparate impact, instead it is necessary to show intentional discrimination."

Brief of the *Amici Curiae* States in Support of Petitioners at 15. See also *Erickson*, 207 F.3d at 950: "When a state law or practice does not expressly concern a particular characteristic (such as race, sex, age, or disability), but has a disparate impact on persons with that characteristic, the plaintiff in constitutional litigation must establish that the state *intends* to discriminate on the basis of that characteristic," citing *Feeney* and *Washington v. Davis*.

In fact, as we show in Part I, neither *Washington v. Davis* nor *Feeney* is particularly instructive in assessing the comparative scopes of the ADA and the Equal Protection Clause. In relying on these cases to assert that a plaintiff in an Equal Protection Clause case must show "intentional discrimination," Petitioners and their *amici* ignore the more fundamental requirement that the state action in question be rationally related to a legitimate state purpose. This point was made unmistakably clear in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), in a case involving the discriminatory denial of a zoning permit for a home for persons with mental disabilities. Neither *Washington v. Davis* nor *Feeney* are inconsistent with the proposition that statutes with a substantially disproportionate adverse impact on persons such as those with disabilities must be rationally related to a legitimate state purpose, because in each case the Court found that state action in question amply related to a "legitimate" or even "worthy" purpose. Other cases, such as *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998), and *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), demonstrate that "deliberate indifference," as well as intentional discrimination, may violate the Equal Protection Clause.

We then show in Part II that the prohibitions of the ADA, including those often labeled "disparate impact provisions," are closely related to the prohibitions of the Equal Protection Clause. The relationship is so close that cases under the ADA will typically have been provable under the Equal Protection

Clause as well. In short, the extent to which the prohibitions of the ADA go beyond the prohibitions of the Equal Protection clause has been greatly overstated by the Petitioners, their *amici*, and the decisions that have held the ADA unconstitutional as applied to the States.

ARGUMENT

I. The Equal Protection Clause Proscribes Not Just Governmental Actions Intended To Disadvantage the Disabled Invidiously, But Also Governmental Actions Which Disadvantage the Disabled in Ways Not Rationally Related to a Legitimate Governmental Purpose or Which Reflect Deliberate or Selective Indifference to Discrimination Against Persons with Disabilities.

As we have explained, Petitioners' argument and the circuit court decisions holding the ADA unconstitutional as applied to the States rest largely on the proposition that, under *Washington v. Davis*, 426 U.S. 229 (1976), and *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979), only "intentional" or "purposeful" discrimination—and not "disparate impact" or denial of "reasonable accommodation"—violate the Equal Protection Clause. These cases, however, have a more limited significance and are consistent with the rule that governmental actions with a substantially adverse impact upon the disabled violate the Equal Protection Clause where they are not rationally related to a legitimate governmental purpose.

Washington v. Davis concerned a test for police recruits, designed to test "verbal ability, vocabulary, reading and comprehension," that plaintiffs, relying on *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), had attacked solely on the ground that the test predominantly failed black recruits and "'bore no relationship to job performance.'" 426 U.S. at 235. This Court ruled that such proof did not make out an Equal Protection Clause violation, rejecting as unworkable "[a] rule

that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another." *Id.* at 248. The test in *Washington v. Davis*, however, served not merely "neutral ends" but clearly "legitimate" ends, as the Court's opinion shows. Indeed, affirming the district court's finding that the test was "reasonably and directly related to the requirements of the police recruit training program," *id.* at 235, the Court ruled in Part III of its opinion that the test met the job-relatedness and business necessity requirement of *Griggs*. *Id.* at 248-52. The Court found it manifestly reasonable for a government to seek "modestly to upgrade the communicative abilities of its employees rather than to be satisfied with some lower level of competence, particularly where the job requires special ability to communicate orally and in writing." *Id.* at 246. It is not surprising that a performance test that met the statutory requirement of Title VII under *Griggs* also met the constitutional standard.

Accordingly, while *Washington v. Davis* stands for the proposition that a "disproportionate impact" (racial or otherwise) is not sufficient to make out a constitutional violation, and that "the invidious quality of a law claimed to be * * * discriminatory must ultimately be traced to a * * * discriminatory purpose," 426 U.S. at 240, it does not rule out different ways of establishing the Equal Protection violation. It specifically acknowledges that the necessary "invidious discriminatory purpose" may often be "inferred from the totality of the relevant facts, including the fact * * * that the law bears more heavily on one race than another." *Id.* at 242. *Washington v. Davis* is thus consistent with finding even a neutral law or other governmental action invalid because the circumstances—including the absence of an adequate, legitimate purpose—point to the necessary "discriminatory purpose" or its functional equivalent.

Personnel Administrator v. Feeney is similarly limited because of the presence there of a legitimate governmental

purpose. *Feeney* reiterated the basic holding of *Washington v. Davis*, in the context of a facially neutral state law with a disproportionate impact on women (a law giving veterans preference in state employment), but added several clarifications. The Court noted that even a facially neutral statute may be "gender-based" and thus presumptively unconstitutional. 442 U.S. at 274. But even if the statute is not gender-based, it may "reflect[] invidious gender-based discrimination." *Id.* In finding the Massachusetts law not "gender-based," the Court relied heavily on the fact that the law excluded a significant number of men as well as women. *Id.* at 275. This implies that the degree of "fit" between classification and objective is significant in evaluating even an ostensibly neutral law.[2] And in finding that the neutral Massachusetts law had not been shaped by a "discriminatory purpose," the Court relied on the district court's conclusion—not disputed on appeal—that the "legislative choice" of favoring veterans in employment was "legitimate." *Id.* at 277. Indeed, the Court referred to that choice as "worthy." *Id.* at 278.

It was in this context that the Court in *Feeney* stated that "discriminatory purpose," for Equal Protection Clause purposes, "implies that the decisionmaker * * * selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* at 279. Whatever explanatory power the words "because of" may have had in *Feeney* and may have in certain cases, they are not exhaustive as a

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[2] See also *Romer v. Evans*, 517 U.S. 620, 632 (1996) ("[E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause; it provides guidance and discipline for the legislature, which is entitled to know what sorts of laws it can pass; and it marks the limits of our own authority.").

general articulation of the Equal Protection standard, because in *Feeney*, just as in *Washington v. Davis*, the Court did not face governmental action not rationally related to a legitimate governmental purpose.

New York City Transit Authority v. Beazer, 440 U.S. 568 (1979), is another case that demonstrates the significance of finding a legitimate governmental purpose. There, the Court began its inquiry with distinguishing between "[g]eneral rules that apply evenhandedly"—which are valid under the Equal Protection Clause—and rules that have "a special impact on less than all the persons subject to its jurisdiction"—in which case "the question whether [the equal protection] principle is violated arise[s]." *Id.* at 587-88. This language strongly suggests that, when the law does not apply "evenhandedly," either because it discriminates on its face or because of its different impact on different groups, then the Equal Protection Clause requires a justification, and, at the very least, that justification must have a rational relationship to a legitimate state purpose. While the city's denial of employment to methadone users in *Beazer* could have been deemed "because-of" discrimination, the Court found that the law did not "create or reflect any special likelihood of bias on the part of the ruling majority" and was not "drawn 'with an evil eye and an unequal hand'" or "motivated by 'a feeling of antipathy against a specific group of residents.'" *Id.* at 593 & n.40 (citations omitted). Instead, the law was motivated by an interest in operating "a safe and efficient transportation system," *id.* at 593 n.40, obviously a legitimate and neutral public purpose of substantial weight, and the means chosen were rationally related to achieving this goal.

There is other evidence of this Court's realization that *Washington v. Davis*, in spite of its language, cannot be read as standing for the proposition that a law or governmental action with a disproportionately adverse impact upon some group will fail the test of the Equal Protection Clause only

upon proof that of some specific intent to injure the disadvantaged group. While *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988), is a case under Title VII of the Civil Rights Act of 1964 and not under the Equal Protection Clause, it is striking that the opinion for the Court states: "The distinguishing features of the factual issues that typically dominate in disparate impact cases do not imply that the ultimate legal issue is different than in cases where disparate treatment analysis is used." 487 U.S. at 987 (citing Justice Stevens's concurrence in *Washington v. Davis*). As the opinion explains, "some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination." *Id.* And as the opinion later explains further, one advantage of disparate impact analysis is that it gets at "the problem of subconscious stereotypes and prejudices," which may not be "adequately policed" by disparate treatment analysis and a requirement of providing "discriminatory intent." *Id.* at 990.[3] Because the proof of disparate treatment in a Title VII case is essentially the proof needed to prove an Equal Protection Clause violation, this language is instructive for the relevance of disparate impact analysis to Equal Protection Clause violations.

M.L.B. v. S.L.J., 519 U.S. 102 (1996), also indicates the Court's appreciation of the limitations of conventional resorts to *Washington v. Davis*. In striking down a state statute that required that a parent seeking to appeal the termination of her parental rights pay a court fee, the Court rejected the State's reliance upon *Washington v. Davis* for the proposition that a neutral law serving ends within the power of government may not be struck down under the Equal Protection Clause simply because of its disparate impact upon a suspect or, as here, a

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[3] The quoted passages are from Parts II-A and II-B of the opinion written by Justice O'Connor. While that opinion is in part a plurality opinion, Parts I, II-A, II-B, and III constituted the opinion of the Court.

non-suspect class. The Court replied: "*Washington v. Davis* * * * does not have the sweeping effect respondents attribute to it." *Id.* at 126. The statute at issue was not merely "disproportionate" in effect, but "wholly contingent on one's ability to pay." *Id.* Statutes of this kind "'visi[t] different consequences on two categories of persons,' [quoting *Williams v. Illinois*, 399 U.S. 235, 242 (1970)]; they apply to all [members of the specified class] and do not reach anyone outside that class." 519 U.S. at 127. While one can read *M.L.B.* as limited by its context to governmental actions that "'wor[k] a unique kind of deprivation,'" *id.*, quoting *Lassiter v. Department of Social Services of Durham County*, 452 U.S. 18, 27 (1981), the discussion of *Washington* was not so limited and suggests strongly that the nature of the statute or governmental action at issue—including the "fit" between the disadvantaged class and a class of persons historically disadvantaged in society—is relevant to determining whether or not proof of "invidious discriminatory purpose" as that term is conventionally understood will be required. In addition, the Court found that the added expense to the State would not be an "undue burden," 519 U.S. at 122, showing that added expense alone may be an insufficient justification for a law with unequal effect.[4]

Against this background, the Court's decision in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), takes on additional clarity. That case may be regarded as one of disparate treatment, because the zoning ordinance required a special use permit for homes for the mentally retarded (as well as several other groups), and

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[4] The dissenters in *M.L.B. v. S.L.J.*, relying on *Washington v. Davis* and *Feeney*, took pains to point out that "[a] disparate impact, even upon members of a racial minority, the classification of which we have been most suspect, does not violate equal protection." 519 U.S. at 135. Nothing in this brief takes issue with that point. We do not contend that a disproportionate impact alone suffices for an Equal Protection Clause violation.

because the focus of the Court's attention was on the specific city council action of denying one particular proposed home the necessary permit. Nevertheless, the city council put forth several entirely neutral reasons for denying the permit—such as the home's location on a five-hundred year flood plain, concerns about the size of the home and number of occupants, and concerns about congestion—and several reasons that, however questionable in relying on community attitudes about the mentally retarded, were not, so far as the Court's opinion shows, motivated by invidious feelings or antipathy towards the mentally retarded. Applying the standard that the governmental action must be "rationally related to a legitimate governmental purpose," the Court found some proffered reasons illegitimate—such as the alleged concern about negative attitudes of nearby property owners—because "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases" for denying a permit that other types of housing do not require, *id.* at 448, and others irrational—such as the alleged concern about the flood plain, size of home, number of occupants, and congestion, *id.* at 449-50. And the Court did not conclude that the case had to be remanded for findings of fact on whether the council had been motivated by animus, invidious intent, or ill will. Instead, the Court adjudged that the council action "appears to us to rest on an irrational prejudice against the mentally retarded." *Id.* at 450. Such action cannot be "rationally related to a legitimate state interest."

By contrast, this Court in *Heller v. Doe*, 509 U.S. 312 (1993), found several legitimate rationales for the state law that imposed a higher burden of proof for the commitment of the mentally ill than it did for the commitment of the mentally retarded, in particular, "differences in the ease of diagnosis and the accuracy of the prediction of future dangerousness and * * * the nature of the treatment received after commitment." *Id.* at 328. Thus, the Court found that the state

law did not create a classification with no rational connection to a legitimate state interest. Moreover, the justifications given in *Heller* for upholding a legislative classification "'if there is any reasonably conceivable state of facts that could provide a rational basis for the classification,'" *id.* at 320, quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993), do not apply to governmental action at the level at which most employment decisions are made. The Court said: "'[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.'" 509 U.S. at 320, again quoting *FCC v. Beach Communications, Inc.*, 508 U.S. at 315. The employment decisions made by State agencies, however, are typically not "legislative choices" but decisions by supervisors or others with delegated powers, as in the two cases now before the Court. Such decisions are fully "subject to courtroom factfinding." While there may be circumstances in which those decisions are based on "rational speculation," more typically they are based on an assessment of the facts available to them or, in an unfortunate number of cases, on irrational beliefs and fears about the disabled, simple hostility, or utter disregard for the possibility that the disabled person can do the job—all of which may be determined through regular discovery.

We have already shown that this Court has acknowledged that a law with disproportionate impact upon certain classes of persons may be "functionally equivalent" to a law that expressly classifies on the basis of membership in the class, using the words of *Watson v. Fort Worth Bank & Trust*, *supra*, 487 U.S. at 987. This insight is particularly applicable to laws that disproportionately impact persons with disabilities, because those laws or regulations are often drafted in terms of the particular physical ability at issue (such as eyesight requirements, lifting requirements, agility requirements, and so forth), and because other facially "neutral" practices, such as constructing a building or space

within a building in such a way that persons in wheelchairs cannot have access, will exclude one class of persons with disability (those who must use wheelchairs) and virtually no others. See *M.L.B. v. S.L.J.*, *supra*.[5]

Moreover, a law or governmental action may "rest on an irrational prejudice" when the government's failure to modify facially neutral requirements to take account of qualified persons with a disability rests on deliberate or selective indifference to the interests and capabilities of such persons. In *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 290 (1998), this Court held that "deliberate indifference to discrimination" can constitute the kind of "intentional discrimination" that is necessary for imposing monetary liability under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* Title IX, like Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, upon which Title IX was modeled, provides remedies for discrimination on the basis of the specified characteristic (sex for Title IX, race for Title VI) that violates the Equal Protection Clause. See *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 589-90 (1983). Thus a school board could be liable for a teacher's unlawful sexual harassment of a pupil, even when the school board intended no such violation,

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[5] Our conclusion here is consistent with the Court's discussion of the Equal Protection Clause in *Kimel v. Florida Board of Regents*, 120 S. Ct. 630, 646 (2000). While the Court stated that "a State may rely on age as a proxy for other qualities, abilities, or characteristics that are relevant to the State's legitimate interests," referring to such a classification as "presumptively rational," it also reiterated that "States may discriminate on the basis of age without offending the Fourteenth Amendment *if* the age classification in question is rationally related to a legitimate state interest." *Id.* (emphasis added). Moreover, disabilities, which come in an almost infinite number of varieties and degrees, often affect only one capacity, and thus are significantly less likely to serve as a rational proxy for a collection of "qualities, abilities, or characteristics" relevant to a State's legitimate interests, even if a particular disability appropriately disqualifies an individual from a particular job.

if the school board had the requisite notice or knowledge and did little or nothing in response. The *Gebser* holding was reiterated and explained in *Davis v. Monroe County Board of Education*, 526 U.S. 629, 641-43 (1999), in the context of school board liability for pupil-on-pupil sexual harassment: "*Gebser* thus established that a recipient intentionally violates Title IX, * * * where the recipient is deliberately indifferent to known acts of teacher-student discrimination." (The Court did not find it necessary to discuss *Washington v. Davis* or *Feeney* in either *Gebser* or *Davis*.)

Discrimination against persons with disabilities has historically been based on prejudice, irrational fear, and simple distaste, as well as ignorance and disregard, as the other *amicus* briefs in this proceeding amply demonstrate. Any of these factors may lead a decisionmaker to discriminate against persons with disabilities in making employment decisions when there is no rational reason whatsoever to do so, either expressly or by deliberate or unconscious indifference to the possibility that the individual may be as well or better qualified than another person to perform what the employer determines to be the fundamental aspects of the job. Such discrimination severely handicaps qualified disabled individuals in pursuing the employment opportunities open to other citizens, and thus severely limits their ability to participate fully in the country's economy. In short, this discrimination restricts those with disabilities in their ability to participate fully in the nation's social and political life.

The equal opportunity to become a self-supporting member of society is a fundamental right of citizenship under the Equal Protection Clause. That Clause speaks directly to that concern in demanding that a State, when acting as an employer, be evenhanded in its treatment of all of its citizens. And as the *Cleburne* case demonstrates, the protection that the Equal Protection Clause extends to persons with disabilities is substantial.

We now turn to the specific provisions of the ADA to show their close connection to the prohibitions of the Equal Protection Clause.

II. The Prohibitions of the ADA, Insofar As They Apply to the States, Are Closely Connected to the Prohibitions of the Equal Protection Clause.

In discussing the specific provisions of the ADA, we concentrate on the provisions of Title I, the employment title. We do so for several reasons. The complaints of Ms. Garrett and Mr. Ash both set forth claims of discrimination in employment, and the prohibitions of the Act as applied to employment are specifically set forth in Title I, not Title II. Moreover, Petitioners and the circuit courts that have ruled against the constitutionality of the ADA as applied to the States have concentrated their fire on the ADA's requirement of reasonable accommodation, which is specifically set forth in Title I in 42 U.S.C. § 12112(b)(5), and on what they term the ADA's prohibition of "disparate impact," with explicit or implicit references to two other provisions of Title I, § 12112(b)(3)(A) and to § 12112(b)(6). *E.g.*, Pet. Br. at 19, 29, 42-43; *Erickson*, 207 F.3d at 951. In addition, the circuit courts are divided on whether any employment action may be brought under Title II of the ADA, and the Court has not granted certiorari on that issue.[6] Finally, the Department of Justice regulations on Title II make the requirements of Title I applicable to actions for discrimination in employment based

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[6] Compare *Zimmerman v. Oregon Dep't of Justice*, 170 F.3d 1169 (9th Cir. 1999) (holding that Congress unambiguously established Title I as the only title of the ADA relating to employment discrimination), *petition for cert. filed*, 68 U.S.L.W. 3129 (U.S. Aug. 10, 1999) (No. 99-243), with *Bledsoe v. Palm Beach County Soil & Water Conservation Dist.*, 133 F.3d 816, 822 (11th Cir. 1998) ("'the language of Title II's antidiscrimination provision * * * is a catch-all phrase that prohibits all discrimination by a public entity, regardless of the context, . . .' Accordingly, employment coverage is clear from the language and structure of Title II." (citation omitted)).

on Title II, if the public entity "is also subject to the jurisdiction of title I," as is the case here. 28 C.F.R. § 35.140(b)(1). Thus, the only question clearly presented at this time is whether Congress exceeded its powers under the Fourteenth Amendment in passing Title I of the ADA.[7]

A. The ADA Expressly Prohibits Intentional or Invidious Discrimination That Would Violate the Equal Protection Clause.

The heart of Title I is the general rule that no covered entity shall "discriminate against a qualified individual with a disability because of the disability of such individual" in regard to employment. 42 U.S.C. § 12112(a). The meaning of the term "discriminate" is then further specified in the seven paragraphs of § 12112(b).

The general rule, by itself, manifestly prohibits the kind of discrimination that would be prohibited by the Equal Protection Clause. It encompasses "intentional discrimination," "purposeful discrimination," "invidious discrimination" and all of the other locutions that the Court has used in its attempts to capture the essence of an Equal Protection Clause violation. Concern about such discrimination, whether by State entities or by private entities, was one of the major themes that led to the ADA. Congress found that individuals with disabilities "continually encounter * * * outright

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[7] Much of what is said in this brief would be applicable to defending the constitutionality of Title II of the ADA as applied to the States in non-employment contexts. We consider it highly unlikely, however, that this Court will directly address the constitutionality of Title II in this case. The meaning of the general rule against discrimination by public entities in Title II is elaborated not in specific statutory provisions, as in Title I, but in regulations of the Department of Justice issued under Congressional direction pursuant to 42 U.S.C. § 12134. See 28 C.F.R. part 35. That difference, coupled with the many different contexts in which Title II may be applicable and Congress's enactment of a severability provision, 42 U.S.C. § 12213, counsels against reaching out to decide questions not presented by this case.

intentional exclusion, * * * exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities." § 12101(a)(5). Accordingly, § 12112(a) clearly was intended to prohibit and, by its very terms, does prohibit deliberate, purposeful exclusion based on irrational fear or prejudice.

That general rule of § 12112(a) is also broad enough to cover discrimination based on the kind of deliberate indifference to the needs of qualified persons with disabilities that would constitute a violation of the Equal Protection Clause. *See, e.g., Powers v. MJB Acquisition Corp.*, 184 F.3d 1147, 1153 (10th Cir. 1999) ("intentional discrimination can be inferred from a defendant's deliberate indifference to the strong likelihood that pursuit of its questioned policies will likely result in a violation of federally protected rights").[8]

In this connection, we note that Ms. Garrett's complaint specifically alleges that the University of Alabama "intentionally, maliciously and with reckless indifference discriminated against [her] because of her disability * * *." Garrett Amended Complaint ¶ 18, J.A. 40-41. Depending on the evidence at trial, her case could well demonstrate the kind of invidious discrimination against a disabled person, regardless of job performance, that could be pursued under the Equal Protection Clause. While Mr. Ash's complaint is not as explicit in alleging invidious discrimination, his complaint alleges, in part, failure by the Alabama Department of Youth Services to enforce its own no-smoking policy, despite being aware of the severe impact on Mr. Ash because of his respiratory disability. Ash Complaint ¶ 8, J.A. 8. Mr.

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[8] With respect to the parallel provision in Title II of the ADA, § 12132, Justice Kennedy, concurring in the judgment in *Olmsted v. L.C.*, 119 S. Ct. 2176, 2192 (1999), remarked: "Underlying much discrimination law is the notion that animus can lead to false and unjustified stereotypes, and vice versa."

Ash's allegation is broad enough to encompass proof that the Department (or the responsible supervisor) was deliberately indifferent to his plight or even hostile to people in his predicament. While Petitioners assert (at 29) that "a motion to dismiss an equal protection claim [in *Garrett* and *Ash*] would be compelled," they do so by ignoring the allegations of the complaints mentioned above.[9]

Finally, the general rule of § 12112(a) is broad enough to cover exclusions of persons with disabilities or classifications with an adverse impact on such persons when those exclusions or classifications simply have no rational relationship to a legitimate state purpose, taking into account the impact of the exclusion or classification—actions that, when taken by the State, would violate the Equal Protection Clause, as shown by *Cleburne*, and *M.L.B. v. S.L.J.*, discussed above, and other rational basis cases. See, *e.g.*, *Plyler v. Doe*, 457 U.S. 202, 224 (1982) (denial of public education to undocumented alien children violated the Equal Protection Clause; such a denial "can hardly be considered rational unless it furthers some substantial goal of the State"). See also *Turner v. Safley*, 482 U.S. 78, 89-90, 98-99 (1987) (prison regulation prohibiting most inmate marriages failed to satisfy the test of a "valid, rational connection" to a "legitimate and neutral" governmental objective).[10]

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[9] See *Village of Willowbrook v. Olech*, 120 S. Ct. 1073, 1074 (2000) (affirming the reversal of an order dismissing a complaint under the Equal Protection Clause and stating, "Our cases have recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.").

[10] These cases are more analogous to the types of cases that would be brought under Title II of the ADA, rather than Title I, but the underlying principle is the same.

B. The ADA Requirement of Reasonable Accommodation Is Closely Connected to the Requirements of the Equal Protection Clause.

Petitioners appear to consider it obvious that the ADA goes far beyond the requirements of the Equal Protection Clause in requiring a covered entity to make a "reasonable accommodation" unless the accommodation would impose an "undue hardship on the operation of the business" of the covered entity. § 12112(b)(5)(A). Pet. Br. at 42-43. In fact, the "reasonable accommodation" is reasonably well-tailored to the requirements of the Equal Protection Clause with respect to persons with disability.

As an initial matter, the requirement of "reasonable accommodation" comes into play only if the plaintiff meets the threshold requirements of being a "qualified individual" with "a disability." Establishing that one is an individual with a "disability"—a term defined in § 12102(2)—is a significant hurdle for an ADA plaintiff, as the Court's recent decisions show. *Murphy v. United Parcel Service, Inc.*, 119 S. Ct. 2133 (1999); *Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139 (1999); *Albertsons, Inc. v. Kirkingburg*, 119 S. Ct. 2162 (1999).[11] A plaintiff must then establish that he or she is a "qualified" individual with a disability within the meaning of § 12111(8), meaning "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." This requirement is also a highly significant limitation on the employer's obligation under the ADA, as shown by the Interpretative Guidance on Title I,

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[11] Section 12102(2) defines "disability" to mean:

> "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
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> "(B) a record of such an impairment; or
>
> "(C) being regarded as having such an impairment."

issued by the Equal Employment Opportunity Commission ("EEOC"), which, among other things, states that "the inquiry into essential functions is not intended to second guess an employer's business judgment with regard to production standards, whether qualitative or quantitative, nor to require employers to lower such standards." 29 C.F.R. § 1630 App., Guidance on § 1630.2(n), last ¶. If the individual cannot perform an essential function of the job under the statutory standard, even with a reasonable accommodation, then the employer is, under the ADA, free to decline to hire the individual on that ground, free to fire the employee who becomes thus disabled, and free to decline to transfer or decline to promote the employee who is or becomes thus disabled with respect to the desired position.

Finally, while Petitioners seem to suggest that employers will rarely be able to establish that a requested accommodation is "unreasonable" or that even an otherwise reasonable accommodation would impose on "undue hardship," the statutory language does not compel such a result. The term "undue hardship" is defined as an "action requiring significant difficulty or expense, when considered in light of" factors that include:

> "(i) the nature and cost of the accommodation * * *;
>
> "(ii) the overall financial resources of the facility * * *; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
>
> "(iii) the overall financial resources of the covered entity; the overall size the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
>
> "(iv) the type of operation or operations of the covered entity, including the composition, structure, and

functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity." § 12111(10)(A) and (B).

Petitioners do not argue that some important factor has been left out of this list of factors, and it would be difficult to argue that the list does not give employers wide room to argue that a particular accommodation imposes an undue hardship.[12]

In any event, in many cases an employer's refusal to make an accommodation will be based on the kind of ignorance, hostility, prejudice that would be actionable in any event under the general rule of § 12112(a) and the Equal Protection Clause. As noted above, that may be the case for Ms. Garrett and Mr. Ash. In other cases, the employer may be refusing to make an accommodation for a qualified individual with a disability when it has, on many occasions, made accommodations of equivalent nature or cost for individuals without disabilities—conduct that may, on appropriate proof, be actionable under the Equal Protection Clause. In still other cases, the employer may have facially neutral reasons for denying an accommodation, but those reasons may have been adopted with a unlawfully discriminatory purpose, may not be applied even-handedly, and may not be rationally related to the legitimate conduct of its business or activities. See, *e.g.*, *M.L.B. v. S.L.J.*, *supra*, where the Court, in finding a violation of the Equal Protection Clause in a court fee, found that the added expense to the State would not be an "undue burden," 519 U.S. at 122, showing that added expense alone

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[12] We do not discuss whether, to the extent that it has done so, Congress may constitutionally shift the burden of persuasion on some of these issues from plaintiff to defendant, because such a rule of trial procedure seems well within the limits imposed by the congruence and proportionality test addressed in other briefs.

may be an insufficient justification under the Equal Protection Clause for a law with unequal effect.[13]

Thus, the argument of Petitioners and the courts that have ruled against the constitutionality of the ADA rests on supposed cases where the denial of a request for a reasonable accommodation by a qualified individual cannot be based on "undue hardship" but would nevertheless be rationally related to the legitimate conduct of the employer's business and not the product of indifference, negative stereotypes, fear, and other grounds that would fail the test of *Cleburne* and other cases. We do not deny that such cases may come up, but there is little reason on this record for concluding that those cases will dominate litigation or compliance under § 12112(b)(5), and there would be no justification for holding Title I of the ADA invalid as applied to actions against the States when such a case is not before the Court. Indeed, none of the specific examples of alleged ADA excesses in the Brief of the *Amici Curiae* States in Support of Petitioners (at 18-27) involves § 12112(b)(5).

In *Erickson v. Board of Governors*, 207 F.3d 945 (7th Cir. 2000) (Easterbrook, J.), the court attempted to recite a clear example of ADA excess, stating:

> "[I]t is rational for a university to favor someone with good vision over someone who requires the assistance of

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[13] See also *Turner v. Safley*, 482 U.S. 78, 90-91 (1987), where, in applying a rational basis test essentially equivalent to the test of the Equal Protection Clause, the Court remarked: "By the same token, the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns. * * * [I]f an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at de minimis cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard." While made in a different context, these words have obvious relevance to accommodations sought in the employment context, as well as to accommodations sought in institutional and other contexts covered by Title II of the ADA.

> a reader. The sighted person can master more of the academic literature (reading is much faster than listening), improving his chance to be a productive scholar, and also is less expensive (because the university need not pay for the reader). An academic institution that prefers to use a given budget to hire a sighted scholar plus a graduate teaching assistant, rather than a blind scholar plus a reader, has complied with its constitutional obligation to avoid irrational action. But it has *not* complied with the ADA, which requires accommodation at any cost less than 'undue hardship'." 207 F.3d at 949.

As an initial matter, this example appears to take it as a given that faster reading produces better scholars, a matter that is least debatable because blind scholars, even if slower, may master the available material better, write more and wiser articles, be better lecturers, and so forth. Indeed, it may be irrational or simply discriminatory not to hire a blind scholar and the required reader, if the scholar is at the top of his or her field and the cost of the reader is similar to the costs of other accommodations of "special arrangements" provided to other scholars. Accepting, however, what appears to be one assumption of the hypothetical—that the sighted scholar turns out to be better qualified than the blind scholar, even if the University were to provide the blind scholar with a reader—the same circuit has indicated, in a slightly different context, that the University in the example could in fact "favor" the sighted scholar without violating the ADA:

> "Suppose that two workers are vying for a promotion to a job that requires a lot of reading. One of the workers is dyslexic, and as a result reads very slowly. He can do the job for which he is applying—and let us assume that his employer would give him the job if there were no other applicant for it—but he can't do it as well as the other applicant, who does not have a disability. It is not the dyslexic worker's 'fault' that he can't read as well as

> his competitor; it is due entirely to his disability. The employer could not refuse to consider him for the promotion because of his dyslexia, but it is not disability discrimination for the employer to give the promotion to the other worker, the one who can do the job better." *Matthews v. Commonwealth Edison Co.*, 128 F.3d 1194, 1196 (7th Cir. 1997) (Posner, J., with Easterbrook and Wood, JJ., concurring).

If this is correct—and we do not contend that such issues have been thoroughly sorted out yet in the courts of appeals, much less in this Court—then the University in the *Erickson* example may hire or promote the sighted scholar over the blind scholar on the ground that he or she is more qualified than the blind scholar, even if the blind scholar were to be given a reader. That decision would be different from refusing to consider the blind scholar because he would need a reader that the University does not want to provide.

In any event, it is by no means clear that most universities—whose departments may operate on limited budgets and need a certain number of graduate assistants to help with teaching loads—would not satisfy the "undue hardship" test in the kind of case *Erickson* presents. Contrary to the implication of this example and the suggestion in the Brief of *Amici Curiae* States in Support of Petitioners (at 13 n.12), the ADA does not define "reasonable accommodation" to "include * * * readers or interpreters." Section 12111(9) provides that the term "may" include readers or interpreters. It is thus open to a university to argue that the ADA does not require them to hire a blind scholar who needs a reader to do the job.

In short, the animal that *Erickson* attempted to cage—the clear violation of the ADA that is not remotely a violation of the Equal Protection Clause—is more elusive than that decision and Petitioner's Brief indicate. The "reasonable accommodation" requirement of the ADA is not as far

removed from the concerns of the Equal Protection Clause as critics of the ADA have contended. It is in fact closely linked to those concerns, even if it may go beyond the requirements of Equal Protection in some cases.

C. The "Disparate Impact" Provisions of the ADA Are Closely Connected to the Requirements of the Equal Protection Clause.

Petitioners (at 29 and 42-43) characterize two provisions of Title I as "disparate impact" or "disparate-effect" provisions. The first states that the term "discriminate" as used in § 12112(a) includes "utilizing standards, criteria, or methods of administration * * * that have the effect of discrimination on the basis of disability." § 12112(b)(3)(A). The second states that the term "discriminate" also includes "using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria * * * is shown to be job-related for the position in question and is consistent with business necessity." § 12112(b)(6). While the first provision, § 12112(b)(3)(A), does not by its own terms refer to job-relatedness and business necessity, § 12113(a) makes job-relatedness and business necessity a defense to a charge of discrimination under this provision (as well as the other provisions of Title I). The test of job-relatedness and business necessity was obviously drawn from the test for "disparate impact" discrimination established in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

Petitioners have not demonstrated that the public employer's burden of proving that a neutral standard that has a disproportionate impact upon the disabled is "job-related for the position in question and is consistent with business necessity," § 12111(b)(6), is far removed from the burden of defending against an Equal Protection Clause challenge. Two

years before passage of the ADA, this Court described the ultimate issue in a *Griggs* case as follows:

> "Though we have phrased the query differently in different cases, it is generally well established that at the justification stage of such a disparate-impact case, the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer." *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659 (1989), citing *Watson*, *New York City Transit Auth. v. Beazer*, and *Griggs*.

For public employers, this test is remarkably close to the Equal Protection Clause standard, "rationally related to a legitimate state interest."

It is true that Congress in the ADA, as in the Civil Rights Act of 1991, rejected the *Wards Cove* holding that the burden of persuasion in such cases always stayed with the plaintiff, shifting it instead to the employer. See 42 U.S.C. § 12113(a) (the ADA provision) and 42 U.S.C. § 2000e-2(k)(1)(A)(i) (the Title VII provision as amended by the 1991 Civil Rights Act). Congress indicated in passing the 1991 Act that it was codifying the pre-*Wards-Cove* case-law on job-relatedness and business necessity, Pub. L. 102-166, § 3(2), 105 Stat. 1071 (1991), 42 U.S.C. § 1981 note,[14] and the EEOC has indicated that Congress had the equivalent intention in passing the ADA: "The concept of 'business necessity' has the same meaning as the concept of 'business necessity' under section 504 of the Rehabilitation Act of 1973." 29 C.F.R. § 1630 App., Guidance on § 1630.10, first ¶. But the above quotation from *Wards Cove* shows that the terms "job-related" and "consistent with business necessity" were largely synonymous even under pre-*Wards-Cove* case law.

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[14] "The purposes of this Act are— * * * (2) to codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in [*Griggs*], and in the other Supreme Court decisions prior to [*Wards Cove*]."

Moreover, the EEOC's Interpretative Guidelines state that the purpose of the provision is "to ensure that there is a fit between the job criteria and an applicant's (or employee's) actual ability to do the job." *Id.* See also *EEOC v. Amego*, 110 F.3d 135, 144-45 (1st Cir. 1997) ("[W]here, as here, no evidence of animus is present, courts may give reasonable deference to the employer's assessment of what the position demands. * * * [W]e think there should be special sensitivity to the danger of the court becoming a super-employment committee."). Thus, the ADA test of "job-related and consistent with business necessity" appears to be essentially the same as bearing "a manifest relationship to the employment in question." *Griggs*, 401 U.S. at 432. It will be a rare case in which a public employer cannot satisfy that test yet would clearly win an Equal Protection Clause challenge.

As this Court stated in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988), and as we discussed in Part I of this brief, "[t]he distinguishing features of the factual issues that typically dominate in disparate impact cases do not imply that the ultimate legal issue is different than in cases where disparate treatment analysis is used."[15] As the Court in *Watson* further stated, one advantage of disparate impact analysis is that it gets at "the problem of subconscious stereotypes and prejudices," *id.* at 990, which may not be "adequately policed" by disparate treatment analysis and a requirement of providing "discriminatory intent." *Id.* These are additional reasons why it is likely to be a rare case in which an employer cannot establish a defense to an ADA action under §§ 12112(b)(3)(A) or (b)(6) but would clearly succeed in defending an Equal Protection Clause case.

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[15] Shifting the burden of persuasion from plaintiff to employer, as the ADA appears to have done and as the 1991 Civil Rights Act did for Title VII, may be a significant change, but it is procedural, not substantive, and thus does not affect the argument in this brief.

We do not deny that there will be some cases in which a plaintiff succeeds in an ADA disparate impact case that would not succeed as an Equal Protection Clause case. But that fact alone—which may well result from the shifted burden of persuasion—does not establish that the substantive prohibitions of the ADA go far beyond the prohibitions of the Equal Protection Clause.

Finally, while the disparate impact provisions of the ADA are drawn from the test for "disparate impact" discrimination established in *Griggs*, their scope may be considerably more limited. Section 12112(a), the general discrimination rule, prohibits discrimination only against a "qualified individual with a disability," as we have explained, and, because §§ 12112(b)(3)(A) and (b)(6) appear to elaborate on the meaning of "discriminate" in that section, proving that one is a "qualified individual with a disability" may ultimately be found to be a requirement of suits under §§ 12112(b)(3)(A) and (b)(6). *Dicta* in some circuit court cases suggest the contrary, see, *e.g.*, *Matthews v. Commonwealth Edison Co.*, 128 F.3d 1194, 1196 (7th Cir. 1997) (Posner, J.), but the matter is not yet settled. However this matter is ultimately resolved, a plaintiff who does not expect to establish that he or she is a "qualified individual with a disability" may have little incentive to mount a disparate impact attack on an employer's test or standard, because, as explained above, nothing in the ADA would prevent the employer from refusing to hire, promote, or retain such an individual either because of the disability or because of the other qualifications he or she cannot meet.

III. The *Amici* States Supporting Petitioners Advance a Policy Argument that Does Not Do Justice to the Equal Protection Clause.

According to the Brief of the *Amici Curiae* States in Support of Petitioners (at 18):

> "Every suit brought under the ADA diverts State resources into litigation costs—and damages awards where such damages are awarded—that could instead be used to provide services to the disabled and to other citizens of the State. In addition, litigation under the ADA discourages the States from pursuing initiatives to provide and expand core services to their vulnerable populations, and rewards such efforts with private lawsuits costing millions of dollars."

The *amici* organizations signing this brief have no interest in reducing the amount of aid that States provide to some of their most vulnerable and deserving citizens—particularly persons with disabilities so severe that they are unable to enter the employment market. But eliminating employment discrimination against those individuals who can work effectively reduces the need for direct State aid to a substantial number of disabled individuals. More importantly, the cost of supporting disabled persons who *cannot* work cannot, consistently with the Equal Protection Clause, be imposed on the community of those disabled persons who *can* work. It should instead be shared by all citizens through taxation. The costs of remedying employment discrimination may indeed be substantial if State agencies do not take seriously their legal obligations to persons with disabilities under the Equal Protection Clause and the ADA, but Congress, through the express provisions in the ADA, and federal agencies, through the applicable regulations and interpretative guidance, have made substantial efforts to specify and clarify obligations that, as we have shown in the brief, are rooted in and closely connected to the prohibitions of the Equal Protection Clause. The States may at times lose lawsuits they should have won, because litigation is not perfect, but individuals with disabilities face the same difficulty, with fewer resources to fall back on. One may quarrel as a policy matter with Congress's decision to remedy employment discrimination

against the disabled by providing monetary relief against the unsuccessful employer-defendant when that defendant is a State agency, but the availability of such relief alone is no argument against Congress's power under Section 5 of the Fourteenth Amendment.

CONCLUSION

For the reasons set forth in Respondents' Brief and above, this Court should hold that Congress did not exceed its powers under Section 5 of the Fourteenth Amendment in making the ADA prohibitions against employment discrimination (the only provisions potentially applicable in these cases) applicable to the States and should accordingly affirm the judgment of the court of appeals in these cases.

Respectfully submitted,

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APPENDIX

APPENDIX

The *Amici* Organizations

The American Association of People with Disabilities ("AAPD") is a non-profit membership organization of children and adults with disabilities, their family members, and their supporters. AAPD's mission is to promote political and economic empowerment for the more than 56 million Americans with disabilities. AAPD was founded on the fifth anniversary of the signing of the Americans with Disabilities Act (ADA). AAPD works to ensure effective enforcement and implementation of the ADA and other civil rights laws.

AARP is a nonprofit membership organization serving more than thirty-four million persons age 50 and older that is dedicated to addressing the needs and interests of older Americans. One of AARP's primary objectives is to strive to achieve dignity and equality in the workplace through positive attitudes, practices, and policies towards work and retirement. In pursuit of this objective, AARP has since 1985 filed more than 200 *amicus* briefs before this Court and the federal appellate and district courts. More than one-third of AARP's members are employed, and many of those with disabilities rely on the ADA to create a work place free from discrimination. The ADA's protections are especially important to AARP members because older persons have a higher incidence of disabilities than other populations.

ADAPT is a national organization, most of whose members have severe disabilities and have been institutionalized in nursing facilities and other public institutions solely because they have disabilities. ADAPT has a long history and record of enforcing the civil rights of people with disabilities and was one of the key organizations that participated in the political and legislative process that resulted in the passage in 1990 of the ADA.

The American Council of the Blind ("ACB") is a leading national consumer organization of the blind, which strives to improve the quality of life, equality of opportunity, and independence of all persons who are blind. To that end, ACB seeks to educate policymakers about the needs and capabilities of people who are blind, to assist individuals and organizations wishing to advocate for the needs of people who are blind, and to disseminate information to both the blind and sighted public. ACB was at the forefront of activity which led to the enactment of the ADA. Efforts to preserve the rights gained through that statute, and to strengthen its protections for blind people, continue through our legislative and advocacy activities aimed at increasing the accessibility of employment, information, public transportation, and programs and services of state and local governments. As a result, ACB is deeply concerned that these rights may be in jeopardy. Further, we are concerned that, if the ADA is weakened, there will be a return to previous patterns of consistent and pervasive discrimination against persons with disabilities, and particularly persons who are blind, by state and local government entities. Therefore, we believe that efforts to preserve and vigorously enforce the ADA are of paramount importance.

The American Foundation for the Blind ("AFB"), a non-profit organization founded in 1921 and recognized as Helen Keller's cause in the United States, is a leading national and international resource for blind individuals and the professionals who serve them. Its mission is to ensure people who are blind or visually impaired to achieve equality of access and opportunity that will ensure freedom on choice in their lives. It fulfills this mission primarily by preparing and disseminating information resources for the public, educating policymakers about the needs and capabilities of people who are blind or visually impaired, and advocating the development and implementation of blindness-related public policy. AFB led the field of blindness in advocating the

enactment of the ADA. Today, AFB continues its work to protect the rights of blind and visually impaired people to equal access to employment, information, and the programs and services of state and local governments. Accordingly, the AFB is profoundly concerned that these rights, which are critical to the independence, equality, and competitive productivity of people who are blind, may be in jeopardy. AFB believes that the long history of consistent and pervasive discrimination by state and local government entities warrants the preservation and vigorous enforcement of the ADA.

The American Network of Community Options and Resources ("ANCOR") is a nationwide association of 700 private, non-profit, for-profit and family care agencies that together provide support and services to more than 150,000 people with disabilities. ANCOR has thirty years of proven leadership representing private providers at the federal level. The membership services persons of all ages, income levels, sexes, and races in urban, rural, and suburban areas—supporting people wherever they live and work. Most member agencies support group homes, apartments, and other supported living arrangements in typical, stable family neighborhoods in order to best meet the needs of the people they support. Some members provide vocational and employment services through supported employment, community rehabilitation programs, and extended employment arrangements. Consequently, the case before the Court will have substantial impact on ANCOR's members.

The Arthritis Foundation is the only national, voluntary health agency seeking to prevent, control, and cure the more than 100 forms of arthritis. The organization serves over 43 million Americans with arthritis and related conditions through research, advocacy, and services. With the number of people living with these diseases predicted to rise to 60 million by 2020, the Arthritis Foundation is leading efforts to battle the nation's leading cause of disability.

Easter Seals, Inc., has been providing services that help children and adults with disabilities gain greater independence for more than 80 years. Its primary services, medical rehabilitation, job training and employment, inclusive child care, adult day services, and camping and recreation benefit more than one million individuals and their families each year at one of 400 centers nationwide. Easter Seals has also been a leading proponent of public policies that promote equality, dignity, and independence for people with disabilities. The organization championed the enactment and implementation of the ADA to prohibit discrimination against persons with disabilities in employment, transportation, telecommunications, public accommodations, and public services.

The Epilepsy Foundation® is the sole national, charitable voluntary health organization dedicated to advancing the interests of the more than two million people with epilepsy and seizure disorders. The term "epilepsy" evokes stereotyped images and fears in others that affect people with this medical condition in all aspects of life, especially employment. Since its inception, the Foundation has worked to dispel the stigma associated with seizures and has supported the development of laws that protect individuals from discrimination based on these stereotypes and fears.

The Learning Disabilities Association of America ("LDA") is a national, non-profit, volunteer organization including individuals with learning disabilities, their families, and professionals. LDA is dedicated to enhancing the quality of life for all individuals with learning disabilities and their families, to alleviating the restricting effects of learning disabilities, and to supporting endeavors to determine the causes of learning disabilities. LDA seeks to accomplish this through advocacy, education, research, and service, and through collaborative efforts. Individuals with learning disabilities are capable of joining the workforce right out of high school or going on to college, but because of their

disabilities, many were not able to do so before passage of the ADA. It was not until passage of that Act that individual with learning disabilities were assured of appropriate accommodations by private entities, licensing boards, and employers that include state and local governments.

The National Mental Health Consumers' Self-Help Clearinghouse is a national technical assistance center established in 1986. It is run by and for people who are consumers of mental health services and survivors of psychiatric illness (known as consumers/survivors). Its mission is to promote consumer/survivor participation in planning, providing and evaluating mental health and community support services, to provide technical assistance and information to consumers/survivors interested in developing self-help services, and advocating to make traditional services more consumer/survivor-oriented. As will all of the other *amici*, the Clearinghouse has an interest in helping people with mental illness live to their full potential as active members of the community.

The National Association of the Deaf, whose members are deaf and hard-of-hearing adults, parents of deaf and hard-of-hearing children, and professionals, works to safeguard the civil rights of deaf and hard-of-hearing Americans.

The National Association of People with AIDS ("NAPWA"), founded in 1983, serves as a national voice and information and advocacy resource for the nearly one million people believed to be living with HIV/AIDS in the United States. NAPWA's mission is to advocate on behalf of all people living with HIV in order to end the pandemic and the human suffering caused by HIV/AIDS. The ADA has prevented untold cases of HIV-related discrimination. NAPWA's interest in this case is to ensure that this landmark civil rights law is not narrowed in scope or weakened in the protections it affords people living with HIV/AIDS.

The National Association for Rights Protection and Advocacy ("NARPA") includes recipients of mental health and developmental disabilities services; lay, professional and self-advocates; family members; service providers; disability rights attorneys; and teachers at schools of law, social work, and public policy. It is dedicated to promoting the preferred options of people who have been labeled mentally disabled.

The National Council on Independent Living ("NCIL") is a membership organization that advances the independent living philosophy and advocates for the human rights of, and services for, people with disabilities to further their full integration and participation in society. NCIL was established in 1982 and is the leading national, cross-disability, grassroots organization run by and for people with disabilities.

The National Multiple Sclerosis Society, with over 600,000 members and 83 chapters and divisions, is dedicated to ending the devastating effects of multiple sclerosis. The Society focuses on providing services, information, and programs to people with MS and funding for MS biomedical and health services research. The Society supports efforts to increase accessibility and independence, as well as to prevent discrimination.

The National Organization on Disability ("N.O.D.") promotes the full and equal participation of America's 54 million men, women, and children with disabilities in all aspects of life. N.O.D. was founded in 1982 at the conclusion of the United Nations International Year of Disabled Persons. Funded entirely by private-sector contributions, N.O.D. is the only national disability network organization concerned with all disabilities, all age groups, and all disability issues.

The National Parent Network on Disabilities serves children, youth and adults with disabilities and their families.

The organization's goal is to help people with disabilities live a full and integrated life.

The National Senior Citizens Law Center advocates for the independence and well-being of low-income, elderly individuals, as well as persons with disabilities. Due to the high incidence of disability among the elderly population, enforcement of the ADA is of particular concern to this organization.

The Polio Society serves its nationwide membership with information and referral services, training in self-advocacy to enforce the civil rights of persons with disabilities, and support for legislation of benefit to polio survivors and the disability community at large. The members are persons with disabilities as a result of polio and post-polio syndrome ("P.P.S."). The ADA is a key element of the Polio Society's advocacy.

Volunteers of America, Inc., is a national nonprofit, spiritually-based organization providing local human service programs and opportunities for individual and community involvement. Volunteers of America is one of the nation's largest and most comprehensive charitable human services organizations, providing services to the physically, mentally, and developmentally disabled as well as to children and youth at risk, the elderly, the homeless, and other people in need. Volunteers of America helps over 1.5 million people each year. It currently operates 43 programs specifically for the developmentally disabled, providing intensive service to nearly 2,500 youth, adults, and seniors in 10 stats. The diverse programs offered include independent living training, assessment, and job placement, case management, protective services, supported and assisted living, as well as residential care and a residential camping program that began in 1941. All of these programs receive some federal, state, or local government funding.